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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 508

LEWIS C. DOUGALL,
Petitioner,

vs.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,
Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

I. CERTIORARI. Respondent makes a rather fantastic request of this Court for a summary denial of petitioner's prayer for a writ of certiorari, or so it seems to petitioner. On page 7 of respondent's brief occurs the following:

> "In view of the fact that this Court declined to grant a petition for a writ of certiorari in the Norman case (342 U.S. 945) the present application made by the same counsel borders on the frivolous."

Counsel for petitioner does not know what the Journal of the Court shows, if anything, on the denial of certiorari in the Norman case; but labors under the impression that it is the doctrine of this Court that a denial of certiorari has no weight as a precedent, and in the particular case (Norman) it means only that further review will not be entertained. Counsel may be wrong; he hopes that he is, for if the Court found error in denying Norman's petition for writ of certiorari, maybe it could purge said error from its records and thus open the door to Mr. Norman so that he might ultimately obtain some relief for his terrible injury sustained by him when he was hurled to the ground 60 feet, all due to the negligence of the contractor of the railroad, the S. P. & S., (the same one as in the case at bar), which work was repairing a trestle used in the railroad's main line in its interstate commerce.

The wish is father to the thought in this observation; however, in connection with the respondent's request for dismissal, it is suggested that the significance of a denial of certiorari may be educational to respondent, Bench and Bar in general, by perusal of the opinion by Mr. Justice Frankfurter wherein, inter alia, was said:

> ". . . all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding

the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated." Maryland v. Baltimore Radio Show.

In view of the charge of frivolity, let us examine the criticism former Mr. Justice Roberts made of this Court in granting certiorari in Bailey v. Central Railroad of Vermont, and use those observations as a yardstick to see if the petition herein is in fact frivolous.

On this subject, Mr. Roberts said:

> "And so the policy of the court has been to abstain from taking a case even though it thought it erroneously decided below, whether on an issue of law or fact, if the decision did not involve an important question of law, did not create a diversity of decision in lower courts, or would not seriously affect the administration of the law in other cases. And this has been especially so where a decision below recognized the controlling legal principles but was claimed to have applied them improperly to the specific facts disclosed."

Petitioner claims that this case comes within the yardstick laid down by Mr. Roberts, because:

(1) The decision involves an important question of law;

(2) The decision does create a diversity of decisions in lower courts;

(3) The decision will seriously affect the administration of the law in other cases.

Petitioner has stated, on pages 8 and 9 of his petition, his reasons why certiorari should be granted. These reasons may be summed up briefly: The lower courts

have determined as a matter of law that a workman engaged in repairing the roadbed and mainline tracks of a common carrier used by it in furtherance of interstate commerce and injured while doing this work cannot have protection under FELA where the common carrier employed a private corporation to perform this work with its own men, despite the fact that the contract for the performance of the work to be done for respondent by the contractor reserved to respondent the right to control the manner, means and result of such work, with the additional right to terminate such contract at will (Exhibit 14).

II. QUESTION. Let us restate the question presented to this Court, as to whether or not certiorari should or should not be granted; let's find out what is the question.

Question as stated by Petitioner:

Under the contractual relations between respondent and Morrison-Knudsen Co., Inc. for the repairing of portions of respondent's main line roadbed by Morrison-Knudsen Co., Inc., was petitioner protected by the Federal Employers' Liability Act for injuries sustained by him while engaged in repairing the roadbed of respondent?

Question as stated by Respondent:

May an employee of a bona fide independent contractor maintain suit under the Federal Employers' Liability Act against a railroad to recover damages on account of personal injuries allegedly caused by the contractor's negligence?

III. LAW. The question as stated by respondent is not comprehensive enough, for if the work of the employee were original construction the answer would be in the negative; on the contrary, if the work were repair work, the answer would be in the affirmative. The 7th Circuit (Miles v. Penn Ry., supra) considered this question wherein certain work was original construction, other work was repair work, and the employee was engaged on both. It became necessary to determine on which he was injured, whether on the original construction of a new railway, or the maintenance of an old one. On that problem the Court said:

> "Admittedly the defendant could not have escaped the liability inmposed by this Act (FELA) by contracting with a contractor to take over the ordinary and necessary maintenance work on track which it used in interstate commerce."

The same question was considered in Erie Ry. v. Margue, supra, where it was held that despite such attempted delegation the workman was still entitled to the benefits of the Act. Likewise, the same question arose and was similarly disposed of in Roth v. Penn Ry. Co., supra.

Case at bar rests on the Norman case which holds otherwise and stems from an observation made by the Court in Erie Ry. Co. v. Margue, to-wit:

> "It might well be argued that the duty of a railroad company to maintain its right of way, over which it and it alone operates its trains, cannot be delegated to another, so as to relieve the company of any part of its responsibility therefor—certainly not as to the public which it serves, AND PER-

HAPS NOT AS TO THOSE WHO WORK UPON ITS TRACKS."

The Norman case, which was decisive of case at bar, holds that it can escape such responsibility as to those who work upon its tracks. Norman decision says:

> "In view of the history of such construction by independent contractors ever since railroads have been in existence, it is necessary to answer that the employees of the contractor do not become employees of the railroad by any legal theory. This does not derogate from the duty of the railroad to construct AND REPAIR such structures. But the duty is not to plaintiff but to its passengers."

So it will be noted that the Court in the Norman and case at bar makes no distinction between original construction of a railroad, never used in interstate commerce, and the repairs of tracks and trestle of a railroad used in the furtherance of interstate commerce; but held that both can be delegated to another and those injured in either case have no protection under the FELA. On this law of the Norman case, case at bar laid down the doctrine that petitioner had no protection under the FELA despite the fact that he was helping to repair the main line tracks of respondent which had been used theretofore for years, and used every hour of the day during the time of the repairs, and ever since. The courts are unanimous in holding that a railroad cannot delegate to another its duty to repair its tracks and trestles, and evade its responsibility under the FELA to any workman injured while engaged therein, the Norman and instant case excepted. The error the District and Appellate Courts made in the Norman case, the re-

spondent would now have pyramided and the Norman case made as the leading decision on the question, and thereby open the door for the railroads of the country to hire independent contractors to do all repairs of all facilities used in the furtherance of interstate commerce and thusly assign the FELA to an innocuous disquietude.

The Norman decision (p. 33, Petition for Writ of Certiorari) says:

> "If there were a question of control of the operation by the railroad, a possibility exists that liability of the railroad might be worked out."

In fact, there is never any question or doubt of ultimate control. The law is unanimous that the common carrier of the railroad in question possesses ultimate control,—and if it fails to exercise it, it does so at its peril. It was this rule of law that exempted the Southern Ry. and held A. C. L. responsible in Treadway v. A. C. L. In case at bar it is admitted that the railroad controlled and constantly used the railroad twenty-four hours of every day during the time of repairs. On the very day Petitioner Dougall sustained his injuries, the time table and the dispatcher's train sheet (Exhibits 10 and 11 respectively) certify to the control and the use of the tracks under repair. Consequently, there is no escape, under the theory of control and whose work was being done, from holding the respondent liable.

The District and Appellate Courts ignored these distinctions and judicially declared that repairing of tracks and trestles could be delegated, and lifted beyond

the protection of the FELA all workmen injured in said work.

Surely respondent itself would not seriously contend that the work was that of Morrison-Knudsen Company, a private corporation, whose contract (Exhibit 14) was nothing more or less than an employment contract of a section foreman, which contract in truth was a device to enable respondent to evade its responsibility to its employees under the FELA, and to that extent was void under Section 5 of the Act. Erie Ry. v. Margue (6th Cir.).

There is no bona fide independent contractor mixed up in this law suit. Not that that fact would make any difference, nevertheless, respondent evidently thinks that it will help it, and so it baldly states as a fact that which is in dispute.

Morrison-Knudsen Co., a private corporation, was employed by respondent (Exhibit 14) to repair its road-bed, etc., of its main line. The work was respondent's work. Respondent controlled the premises, and retained the right to direct the work and the power to terminate the contract at its pleasure.

It was work in furtherance of interstate commerce and—bona fide or no bona fide contractor—the duty was that of respondent which it could neither shirk nor evade; but regardless of who did the work, respondent was in law bound to respond in damages to any person injured while engaged in repairing instrumentalities used in furtherance of interstate commerce.

Let it be said to this Court's credit that practically the identical issue has always been met and mastered by somewhat different answers—sometimes under the law of agency; sometimes pro hac vice; sometimes under Section 5; sometimes under loaned servant doctrine; sometimes under whose work was it; sometimes under theory of control—and on the question of control, it is not whether control is in fact exercised throughout, but, rather, whether the right to control remains in existence throughout the course of the work. This Court in Standard Oil Co. v. Anderson, supra, puts it in these words:

> "To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed,—a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking."

The Court's attention is invited to the 1939 amendment of the Federal Employers' Liability Act, which reads:

> "* * * Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." (Title 45, sec. 51, U.S.C.A.)

Whatever might have been the case before this amendment, it is respectfully submitted that the language of said amendment is definite and broad enough to include the work which petitioner was hired to do and was doing on the main line of the respondent, and such work was clearly part of the railroad's work and within the protection of the Act, and which duty it could not delegate.

Petitioner disagrees with respondent's interpretation of the Act, when it says:

> "It is fundamental that . . . Congress used the words 'employee' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee." (Its brief, p. 4.)

In fact, this Court has said that employment is not limited to the conventional relation of master and servant, i.e., any person whose work furthers the interstate commerce of a common carrier shall be considered the employee of such carrier and shall be entitled to the benefits of the Act. This is the rule laid down by this Court in the cases immediately following.

The existence of the relation of master and servant is determined by ascertaining whose work is being done. In case at bar the work was respondent's and not that of Morrison-Knudsen Company. Standard Oil Co. v. Anderson, supra; Jones v. George F. Getty Ore Co. (10th Cir.); Walling v. McKay (8th Cir.).

Employment, within the meaning of the FELA, is not limited to the conventional relation of master and

servant. N. C. Ry. Co. v. Zachary; Philadelphia B. &. W. R. Co. v. Smith; A. C. L. v. Tredway; and Linstead v. C. & O. Ry.

If the work being done is that of the railroad, that is controlling even if the parties call the party doing the work an independent contractor. Rutherford Food Corp. v. McComb; U. P. Ry. v. C. R. I. & P. Ry. Co.; Moore v. Indus. Com. of Ohio (Ohio). But as said before, the repairing of tracks, etc., is the duty of the carrier which cannot be shirked by lugging in a third party.

The trend of federal decisions and of congresseional action has been toward a liberalization of the FELA and a broadening of the scope of responsibility. Lavender v. Kurn; Ellis v. U. P. Ry.; O'Donnell v. Elgin J. &. E. Ry.; Bailey v. Central of Vermont Ry.

It is submitted that, under the 1939 amendment, if any person was injured while engaged in repairing the tracks of respondent used by it in furtherance of interstate commerce, whether the person was an employee and on the payroll of a lessee-common carrier of respondent, or an employee and on the payroll of a bona fide independent contractor employed by respondent, or an employee and on the payroll of a private industrial corporation, or partnership, or individual employed by respondent to repair its tracks, the respondent would be liable and the workman so injured could maintain his action against respondent for damages. Otherwise, if the rule contended for by respondent and upheld by the Norman case and case at bar, the result is best expressed in Despatch Shops v. Railway Retirement Board:

> "It can be readily seen that the railroad would be free to take from under the act virtually all of their workers whose employment is in the supporting activities, through the simple expedient of setting up wholly owned corporate affiliates to perform these services. It is conceivable that everything from maintenance of way through engineering or bookkeeping might be done by so-called 'independent contractors'; the application of this Act and of the other Acts passed for similar purposes and embodying the same language could be severely limited as to render them of little worth in achieving the purpose for which they were passed."

The respondent places considerable reliance upon the case of Chicago R. I. Etc. P. Ry. Co. v. Bond. The chief difference between that case and case at bar is that in the Railway v. Bond case, the Railway Company was in a position where it really could turn over the details of doing part if its work to an independent contractor, and allow him to remain independent. In the instant case respondent did not have that freedom of action. It was duty-bound to perform its interstate commerce activities and which, in fact, it did; and in fact it was while the worktrain was in the process of clearing the track for respondent's trains that Petitioner was injured by the reckless handling of the flatcar upon which Petitioner was riding and from which flatcar he was knocked off and down upon the tracks under said flatcar.

The Bond case occured 23 years prior to the 1939 amendment. Without question an identical case now would receive a contrary ruling.

There is another distinction to bear in mind between the two cases, and that is, in the instant case Petitioner was engaged in interstate commerce at the time. In Railway v. Bond the Court closed its decision by saying:

> "Thus, being of opinion that Turner was not an employee of the company, but an independent contractor, it is not material to consider whether the services in which he was engaged were in interstate commerce."

So, it would seem that from a consideration of the nature of the work Petitioner and others were doing, respondent could not have discharged its duties as a common carrier in furtherance of its interstate commerce if it had given control of its tracks to the contractor.

Respondent cites two other cases which have less bearing on the question at issue than does the Railway v. Bond case. The two cases are Robinson v. B. & O. R. Co. and Wells, Fargo & Co. v. Taylor. Robinson was a Pullman porter and in truth was on the train simply in the character of a servant of another master by whom he was hired, directed and paid, and at whose will he was to be continued in service or discharged. The Taylor case involved an express messenger in charge of express matter which a railway company was transporting for the express company in an express car furnished by the railway company under a contract which gave the express company the exclusive privilege of conducting an express business, the railway company to provide the motive power, and the express-man was on the train as an employee, not of the railway company but of the express company by which he was employed, directed,

and paid. Neither Robinson nor Taylor was engaged in interstate commerce nor were their employers common carriers by rail, and it is respectfully submitted that they have no value whatever toward the solution of case at bar. Nevertheless, it's these and cases like them that respondent has used to obtain from the District Court of Oregon and the Ninth Circuit favorable decisions. In this connection the Court will find that neither the District nor the Appellate Court cited a single case in support of the decisions in the Norman case.

It is therefore respectfully petitioned that a writ of certiorari as prayed for be granted.

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